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No. 99-723

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IN THE
# SUPREME COURT OF THE UNITED STATES

METRO COMMUNICATIONS COMPANY
and PETER SIAVRAKAS,
*Petitioners*,

v.

AMERITECH CORPORATION, and
AMERITECH MOBILE
COMMUNICATIONS, INC.
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITIONER'S SUPPLEMENTAL BRIEF

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## PETITIONER'S SUPPLEMENTAL BRIEF

On September 3, 1997, the District Court entered what it labeled as its "final" judgment. A copy of the District Court's order is included in the Appendix to Petitioner's Petition for Writ of Certiorari (filed on October 26, 1999) at Appendix B at 5a-7a.[1] It did so after having granted respondents' motion for partial summary judgment regarding trademark claims and respondents' motion to dismiss several non-trademark claims without prejudice, but without having certified the prior decision pursuant to FED.R.CIV.P. 54(b). Thus far, it has been presumed that the District Court's characterization of its judgment was valid and that the Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. §1291. However, upon closer scrutiny, the finality of the judgment and the existence of appellate jurisdiction are questionable.

Applying the dominant view of the Circuit Courts of Appeal, the District Court's judgment was not final and, therefore, the Sixth Circuit Court of Appeals lacked appellate jurisdiction. However there is substantial conflict among and within the Circuits over the correct characterization of such an order and, therefore, as to whether 28 U.S.C. §1291 provides appellate jurisdiction under these circumstances.

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[1] Citations to the appendix in this supplemental brief are a continuation of the citations to the appendix filed with the Petitioner's Petition for Writ of Certiorari. The Petition for Writ of Certiorari contains appendix A-P.

*Procedural History*

On June 24, 1994, respondents filed a seven (7) count complaint against petitioners.

On May 19, 1995, respondents filed a motion for partial summary judgment directed to the trademark claims only. After a series of briefs, on August 24, 1995 the District Court granted partial summary judgment pursuant to FED.R.CIV.P. 56 as to those claims. (Appendix E at 25a-38a).

On August 6, 1996, respondents sought voluntary dismissal of the unresolved claims pursuant to FED.R.CIV.P. 41(a)(2).[2] (Appendix Q at 110a - 113a). Respondents' motion specifically requested dismissal without prejudice. (Appendix Q at 110a - 113a). Petitioners objected to such a dismissal; arguing that those claims would merely be reasserted by respondents at a later date.[3] Instead, petitioners asked the District Court to dismiss the unresolved claims *with* prejudice. (Appendix R at 114a - 123a). On October 17, 1996, the District Court rejected petitioners' request and dismissed the remaining claims *without* prejudice. (Appendix S at 124a - 126a). Having dismissed the unresolved claims without prejudice, the District Court concluded that there was nothing further to address in this action and entered a judgment which it labeled "final." (Appendix B at 5a-7a).

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[2] A Rule 41(a)(1) dismissal was unavailable because the petitioners had filed their answer and would not consent to respondents' proposed dismissal without prejudice.

[3] Indeed, respondents have done just that in a counterclaim in adversary proceedings commenced in the U.S. Bankruptcy Court for the Eastern District of Michigan.

Respondents have never sought certification of the District Court's decision regarding the trademark claims pursuant to FED.R.CIV.P. 54(b).

## I.

## THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT AND ADDRESS THE SUBSTANTIAL CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A PRIOR ORDER RESOLVING LESS THAN ALL CLAIMS IS RENDERED "FINAL" BY THE SUBSEQUENT DISMISSAL WITHOUT PREJUDICE OF UNRESOLVED CLAIMS AND THE RELATED QUESTION OF APPELLATE JURISDICTION.

28 U.S.C. §1291 provides the basis for the Sixth Circuit's assertion of jurisdiction in this case. (Appendix A at 4a). This statute states

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c)

> and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

However, whether a district court's judgment is final under these circumstances depends upon where one finds it. *See generally* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979 (1997).[4]

In the Sixth Circuit, a district court's partial resolution of the parties' claims appears to ripen into a final judgment upon the dismissal of the unresolved claims, regardless of whether the dismissal is with or without prejudice. *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987) (allowing appeal of adjudicated claims when peripheral claims were voluntarily dismissed without prejudice).

In the Second, Third, Fifth, Ninth and Tenth Circuits, a prior resolution of less than all claims does not become final upon a dismissal of the unresolved claims without prejudice. *Chappelle v. Beacon Communications, Inc.*, 84 F.3d 652, 653 (2nd Cir. 1996) (precluding appeal of plaintiff's adjudicated claims when unresolved claims were dismissed without prejudice); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1078 (9th Cir. 1994) (same); *Cook v. Rocky Mountain*

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[4] Prof. Cochran's use of the term "peripheral" is unfortunate, as it suggests that the claims dismissed without prejudice are insignificant. However, the very fact that they are dismissed *without* prejudice indicates that they are valuable to the litigant. The term "unresolved" claims is more accurate. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396; 110 S.Ct. 2447 (1990) (dismissal without prejudice does not constitute adjudication on the merits and has no *res judicata* effect).

*Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992) (same); *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1155 (3rd Cir. 1986) (allowing appeal when remaining unresolved claims "voluntarily and finally abandoned"), *cert. denied*, 481 U.S. 1070 (1987); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302-03 (5th Cir. 1978) (denying appeal and finding voluntary dismissal without prejudice of unresolved claims did not make adjudicated claims appealable). In these Circuits the prior order becomes final only upon: the plaintiff's dismissal of the unresolved claims *with* prejudice or proper Rule 54(b) certification of the district court's decision as to the resolved claim(s). *Chappelle, supra;*

In the Seventh, Eighth and Eleventh Circuits one finds both conclusions are available. *Compare South Austin Coalition Comm. Council v. SBC Communications, Inc.*, 191 F.3d 842 (7th Cir. 1999) (dismissal without prejudice of unresolved claims to obtain finality, "is smoke and mirrors; the reality is that the case is ongoing in the district court, and 28 U.S.C. §1291 does not authorize appeal from resolution of a single claim in a multi-claim or multi-party case"); *and JTC Petroleum Co. v. Piasa Motor Fuels*, Inc., 179 F.3d 1073 (7th Cir. 1999) (no finality where unresolved claims dismissed without prejudice; resulting jurisdictional defect cured by party's conversion of dismissal to one with prejudice) *with Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 & n.1 (7th Cir. 1976) (order granting motion to dismiss less than all claims "final" order, despite dismissal without prejudice of unresolved claims), *cert. denied*, 429 U.S. 1029 (1976) *with United States v. Kaufmann*, 985 F.2d 884, 889 (7th Cir.) (partial resolution of claims deemed final and appealable despite dismissal without prejudice of unresolved claims because there was no evidence that the parties had colluded to "create" appellate jurisdiction), *cert. denied*, 508 U.S. 913 (1993); *and compare, DuBose v.*

*Minnesota,* 893 F.2d 169, 171 (8th Cir. 1990) (dismissal without prejudice for failure to prosecute unresolved claims converted earlier partial resolution into a "final" judgment or order) *with Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991) (earlier decision granting partial summary judgment rendered "final" upon stipulated dismissal without prejudice of unresolved claims) *and State Treasurer v. Barry*, 168 F.3d 8, 10-13 (11th Cir. 1999) (denying appeal and finding voluntary dismissal without prejudice of unresolved claims could not make adjudicated claims appealable) *and Mesa v. United States*, 61 F.3d 20, 22 (11th Cir. 1995) (dismissing appeal for lack of jurisdiction and holding that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice) *with Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir. 1989) (voluntary dismissal without prejudice is final and appealable by the defendant) *and Studstill v. Borg Warner Leasing,* 806 F.2d 1005, 1008 (11th Cir. 1986) (plaintiff voluntarily dismissed without prejudice the claims that remained after adverse ruling on partial summary judgment; Court of Appeals conducted review on the merits of the summary disposition ruling).

Therefore, as it stands, a party may appeal as of right from such an order in the Sixth Circuit, but not in the Second, Third, Fifth, Ninth and Tenth Circuits.

A party in the Sixth Circuit may arguably take the respondents' approach and dismiss unresolved claims to achieve apparent finality, but a party in the Second, Third, Fifth, Ninth and Tenth Circuits is prohibited from such piecemeal litigation.

In the Seventh, Eighth and Eleventh Circuits, a party is required to speculate whether a judgment will ultimately be

considered final. If wrong, the party will either have failed to take a timely appeal or will have wasted the Court of Appeals' resources with a premature request for review. *See, Barrow v. Falck,* 977 F.2d 1100, 1102-03 (7th Cir. 1992), appeal after remand, 11 F.3d 729 (1994) (discussion of frequency of dismissal of appeals for jurisdictional defects).

In the remaining Circuits, any of these outcomes are possible, as it appears those courts have not expressly adopted any approach to this question.

It is difficult to conceive of a more fundamental question of federal civil procedure than whether a judgment or order is final -- except whether a court has jurisdiction to address the merits in the first instance. But as to appellate jurisdiction, one question leads to the other. Petitioners submit that there is no discernable basis for permitting continued conflict among and within the Circuits on these fundamental issues.

This Court's prior decision in *Cooter & Gell, supra* suggest that in this circumstance, the district court's judgment is not final as the dismissal without prejudice leaves claims unresolved and beyond the preclusive effect of the subject judgment. *Cooter & Gell,* 496 U.S. at 396.[5] But the conflict

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[5] This Court's willingness to address an appeal with a similar procedural history in *National Broiler Marketing Assn. v. United States*, 436 U.S. 816; 98 S. Ct. 2122 (1978) (claims against certain defendants dismissed without prejudice "to facilitate appeal") does not resolve the question. There, appellate jurisdiction was presumed, not questioned. Interestingly, petitioner's counsel in *National Broiler, supra*, has now authored his own opinion in favor of the conclusion that the procedural sequence involved in the present case does not result in a final

among the Courts of Appeal demonstrates that there is considerable difference of opinion about whether this is so.

By deciding whether a district court's resolution of less than all claims in an action, followed by the dismissal of unresolved claims *without* prejudice (unaccompanied by Rule 54(b) certification) results in a final order or judgment and appellate jurisdiction pursuant to 28 U.S.C. §1291, this Court would establish uniformity and predictability within the federal courts on this point. By adopting the view that such a judgment is not final, the Court would provide the Courts of Appeal with an unquestionable means of avoiding the waste of resources that accompanies the current conflict. There are no exercises of the Court's authority that are more central to its role and no authority other than this Court that is able to resolve the conflict.

Either the District Court's judgment was final or not. If not, the Sixth Circuit Court of Appeals lacked appellate jurisdiction pursuant to 28 U.S.C. §1291. Such a jurisdictional defect would require that the Court of Appeals' decision be vacated, regardless of the outcome of the issues raised in the petition. *In re Carlo Poma*, 255 U.S. 219, 221; 41 S. Ct. 309 (1921).

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judgment. *See JTC Petroleum Co., supra.* Moreover, there is a significant distinction between a dismissal of parties, as in *National Broiler*, versus dismissal of claims, as in the instant case. *See Missouri ex rel. Nixon v. Cour d'Alene Tribe,* 164 F.3d 1102, 1106 (8th Cir. 1999).

## CONCLUSION

Petitioners request that the Court grant the petition for writ of certiorari to consider these issues of finality and jurisdiction together with those issues identified in the petition. In the alternative, petitioners request that the Court vacate the decision of the Sixth Circuit Court of Appeals and remand these proceedings to the District Court for completion.

Respectfully submitted,

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Dated: November 24, 1999

## APPENDIX Q

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

[Dated August 5, 1996]

No. 94-CV-72443-DT

| | |
|---|---|
| AMERITECH CORPORATION, a Delaware corporation, and AMERITECH MOBILE COMMUNICATIONS, INC., a Delaware corporation, | ) |
| *Plaintiffs*, | ) |
| v. | ) |
| METRO COMMUNICATIONS COMPANY, a Michigan corporation, and PETER SIAVRAKAS, | ) |
| *Defendants*. | ) |

**PLAINTIFF' MOTION FOR ENTRY OF FINAL JUDGMENT AND TO DETERMINE AMOUNT OF ATTORNEYS' FEES**

NOW COME Plaintiffs Ameritech Corporation and Ameritech Mobile Communications, Inc. (collectively

"Ameritech"), by and through their undersigned counsel, and move this Court for entry of a Final Judgment and determination of the amount of attorneys' fees and costs which Plaintiffs will recover in this action pursuant to the Court's Order of January 24, 1996. In support of their Motion Plaintiffs state as follows:

1. On August 24, 1995, this Court entered its Order Granting Partial Summary Disposition to Ameritech on Counts I, II, and VII of Ameritech's Complaint and granted permanent injunctive relief on those Counts. Ameritech thereafter filed a motion for additional relief which included a request for damages and for reasonable attorneys' fees and costs under the same Counts as provided in the Agency Agreement.

2. On January 24, 1996, this Court entered its Order Granting Additional Relief which held that "Ameritech is entitled to reasonable attorneys' fees and costs pursuant to the contract." (Order Granting Additional Relief, p.9). However, the Court did not determine the amount of attorneys' fees and costs to which Plaintiffs are entitled as this action was not concluded and further evidence was submitted on the amount of damages.

3. On April 17, 1996, this Court entered its Opinion awarding Ameritech $265,765 in damages against Plaintiffs. That Order, in conjunction with the Court's prior orders, completely resolved Counts I, II, and VII of Ameritech's Complaint. In light of the relief granted on those counts, there is no need for an adjudication of the remaining counts of Ameritech's complaint. Therefore, the only

remaining issue to be resolved is the amount of attorneys' fees and costs to which Ameritech is entitled.

4. In support of its prior Motion for Additional Relief, Plaintiffs submitted the Affidavit of Robert W. Powell, with attached time records and bills, documenting that the reasonable attorneys' fees and costs incurred by Plaintiffs in this matter through October 31, 1995 totalled $121,895.61. A copy of that Affidavit and the supporting time records and bills has been refiled with this Motion.

5. Since October 31, 1995, Plaintiffs have incurred an additional $6,324.44 in reasonable attorneys' fees and costs in the prosecution of this action. Attached to this Motion is the Supplemental Affidavit of Robert W. Powell with attached time records and bills documenting the additional attorneys' fees and costs incurred by Plaintiffs in this matter.

6. Thus, Plaintiffs have incurred a total of $128,220.05 in reasonable attorneys' fees and costs in the prosecution of this action.

WHEREFORE, Plaintiffs ask that this Court enter a final judgment incorporating the injunctive relief and damages previously granted by this Court, formally dismissing without prejudice the remaining counts, and awarding Ameritech $128,220 in attorneys' fees and costs. A proposed form of Judgment is attached to this Motion.

DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN

By:_____

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Dated: August 5, 1996

## APPENDIX R

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

[Filed September 17, 1996]

No. 94 CV 72443 DT

| | |
|---|---|
| AMERITECH CORPORATION, a Delaware corporation, and AMAUROTIC MOBILE COMMUNICATIONS, INC. a Delaware corporation, *Plaintiffs,* | ) |
| v. | ) |
| METRO COMMUNICATIONS COMPANY, a Michigan corporation, and PETER SIAVRAKAS, *Defendants.* | ) |

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF FINAL JUDGMENT AND TO DETERMINE AMOUNT OF ATTORNEYS' FEES**

NOW COME Defendants Metro Communications, Inc. and Peter Siavrakas by and through their attorneys,

Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, P.C. and in response to Plaintiffs' motion for an entry of final judgment and determination of the amount of attorneys' fees and costs state:

1. Defendants admit the statements contained in paragraph 1 of the motion.

2. Defendants admit the statements contained in paragraph 1 of the motion.

3. Defendants acknowledge the amount awarded in this Court's opinion and that, except for the issue of attorneys' fees and costs, the order resolved Counts I, II and VII of Ameritech's complaint.

4. Defendants' admit that Mr. Powell's affidavit and time record have been submitted to the Court as stated in paragraph 4 of the motion, but deny that the reasonable attorneys' fees and costs incurred by Plaintiffs in this matter total $128,220.00. Because:

a. Plaintiffs' time records and bills contain entries indicating work on matters other than this action, and other than the Lantum Act aspects of this action;

b. Plaintiffs' time records and bills indicate Plaintiffs have included in the amount requested fees for non-lawyers;

c. Plaintiffs' time records and bills indicate that Plaintiffs have included the requested amount excess of costs for items which are properly included in the Plaintiffs' attorneys' overhead.

5. Defendants deny the same as contained in paragraph 5 of the motion for the reasons stated above.

6. Defendants deny the same as contained in paragraph 6 of the motion for the reasons stated above.

**WHEREFORE**, Defendants request that this Court conduct an evidentiary hearing, or appoint a master or other third party to resolve the issue of the appropriateness of Plaintiffs' proposed attorneys' fees and costs and for the reasons set forth in the accompanying brief, deny Plaintiffs' request for dismissal of Counts I, II, III, IV, V and VI without prejudice.

Respectfully submitted,

**SEYBURN, KAHN, GINN, BESS DEITCH AND SERLIN, P.C.**

By: _____

Kenneth B. Morgan (P34492)
Attorneys for Defendants
Suite 1500, 2000 Town Center
Southfield, MI 48075-1195

**Dated**: September 16, 1996

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

[Filed September 17, 1996]

No. 94 CV 72443 DT

| | |
|---|---|
| AMERITECH CORPORATION, a Delaware corporation, and AMAUROTIC MOBILE COMMUNICATIONS, INC. a Delaware corporation, *Plaintiffs,* | ) |
| v. | ) |
| METRO COMMUNICATIONS COMPANY, a Michigan corporation, and PETER SIAVRAKAS, *Defendants.* | ) |

**DEFENDANTS' BRIEF IN SUPPORT OF RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT AND TO DETERMINE AMOUNT OF ATTORNEYS' FEES**

STATEMENT OF ISSUES PRESENTED

I WHETHER THE PROPER AMOUNT OF THE REASONABLE COSTS AND ATTORNEYS' FEES

AWARDED BY THE COURT TO PLAINTIFFS IS $128,220.00 AS REQUESTED

II. WHETHER COUNTS H, III, IV, V AND VI OF PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED WITHOUT PREJUDICE AS REQUESTED BY PLAINTIFFS..

## CONTROLLING OR MOST APPROPRIATE AUTHORITY

F.R.Civ. P. 41

**INTRODUCTION**:

On January 24, 1996, this Court entered its order granting additional relief, in which it determined that Plaintiffs were entitled to "reasonable attorneys' fees and costs pursuant to the (Agency Agreement)." Plaintiffs have now submitted a motion establishing amount of those fees. Plaintiffs contend that the amount of the reasonable attorneys' fees that should be awarded is $128,220.00.

In support of their request, Plaintiffs have submitted two affidavits from Robert Powell and invoices allegedly containing the time records related to work within the scope of the attorney fee provision in the Agency Agreement. However, Mr. Powell's affidavit and the supporting invoices do not support the amount of Plaintiffs' request.

In addition to a determination of the attorneys' fees, Plaintiffs seek the entry of a final judgment, dismissing without prejudice the claims asserted in Counts II, III, IV, V and VI of Plaintiffs' complaint.

## I.
## PLAINTIFFS' REQUEST FOR $128,220.00 IN ATTORNEYS' FEES AND COSTS IS NOT REASONABLE

Plaintiffs' seek $128,220.00 in attorneys' fees and costs under the attorney fee provision contained in the Agency Agreement. However, a review of the materials submitted in support of this request demonstrates: Plaintiffs seek recovery of attorneys' fees for matters other than that for which fees have been awarded; Plaintiffs seek recovery of amounts for

work not performed by attorneys or paralegals; and Plaintiffs seek recovery of overhead items not propedy billed by Plaintiffs' counsel.

**Work Regarding Other Matters**:

A review of Dickinson Wright's billings demonstrates that approximately $6,200.00 was billed to this matter for work as to which no attorneys' fees have been awarded. This work falls into two categories: a) work regarding aspects of this matter outside the scope of the relief granted; and b) work on the pending state court action. It is identified in blue in the attached Exhibit A.

**Work By Non-Attorneys**:

Dickinson Wright's bills also reveal that $1,104.00 has been charged for work that is not the work of an attorney or paralegal. These are the entries of "MLP" on Exhibit A, which are identified in red.

**Duplication Of Effort**

A review of Dickinson Wright's bills demonstrates that $10,120.00 was charged by Kenneth A. McIntyre. Tnese are identified in yellow. However, a review of these bills also demonstrates that this was duplication of effort. Entries show that Mr. McIntyre was involved in reviewing Mr. Powell's work and redrafting portions of it. Given Mr. Powell's status as a partner, either Mr. McIntyre was duplicating Mr. Powell's effort or the reverse was true.

**Excess Overhead Costs**

Dickinson Wright has charged $3,664.65 for computerized legal research. The related entries are identified in pink. This amount does not include the fee associated with that work. However, it is unlikely that Dickinson Wright incurred this expense. As with other large law firms, Dickinson Wright has available to it computerized legal research at a monthly flat rate. Thus, the amounts identified in the bills are not actual costs incurred by Dickinson Wright.

Similarly, Dickinson Wright has charged $2,805.02 for copying. At .15¢ per page, this indicates 18,700 pages. The record in this action does not contain that this volume of paper is reasonable.

## II.

## THE COURT SHOULD NOT PERMIT THE DISMISSAL OF THE REMAINING COUNTS OF THE COMPLAINT WITHOUT PREJUDICE

Plaintiffs also seek to finalize a judgment in this matter by the Court's dismissal of Counts II, III, IV, V and VI of Plaintiffs' complaint. The proposed judgment indicates that Plaintiffs seek dismissal of these claims without prejudice there being reasserted in other proceedings.

As the Court is aware, there are other pending actions between these parties. Plaintiffs request to dismiss without prejudice indicate a reasonable likelihood that there will be a subsequent attempt to assert these claims elsewhere. While the subject of the other Counts in this action and the other

pending proceedings is separate from the claim for trademark protection asserted here, it would be inappropriate to dismiss the identified Counts except with prejudice.

**CONCLUSION:**

The maximum amount of reasonable costs and attorneys' fees recoverable by Plaintiffs is $107,000.00. Further, a dismissal of Counts I, II, III, IV, V and VI should be with prejudice.

Respectfully submitted,

**SEYBURN, KAHN, GINNN, BESS DEITCH AND SERLIN, P.C.**

By: _____

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Dated: September 16, 1996

## APPENDIX S

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

[Dated October 17, 1996]

No. 94-CV-72443-DT

| | |
|---|---|
| AMERITECH CORPORATION and AMERITECH MOBILE COMMUNICATIONS, INC., *Plaintiffs,* | ) |
| v. | ) |
| METRO COMMUNICATIONS COMPANY, and PETER SIAVRAKAS, *Defendants.* | ) |

**MEMORANDUM OPINION AND ORDER**

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 17th day of October, 1996.

PRESENT: THE HONORABLE
GEORGE E. WOODS
United States District Judge

This matter is before the Court on plaintiffs' motion for entry of final judgment and to determine the amount of attorneys' fees [Docket No. 67]. On August 24, 1995, the Court granted partial summary judgment to plaintiffs on Counts I, II, and VII of their complaint and granted permanent injunctive relief. Thereafter, Ameritech filed a motion for additional relief, including damages and reasonable attorneys' fees and costs. On January 24, 1996, the Court held plaintiffs were entitled to reasonable attorneys' fees and costs pursuant to the parties' contract. On April 17, 1996, the Court awarded plaintiffs $265,765 in damages. Plaintiffs contend that in light of the relief granted on those counts, there is no need for an adjudication of the remaining counts of the complaint. Consequently, plaintiffs request dismissal of those counts without prejudice.

Defendants protest dismissal without prejudice. According to defendants, plaintiffs' request for dismissal without prejudice indicates "a reasonable likelihood that there will be a subsequent attempt to assert these claims elsewhere." Although defendants acknowledge that the counts subject to dismissal involve claims separate from the claim for trademark protection that was decided by this Court, they nevertheless contend that a dismissal without prejudice would be inappropriate.

Under Fed. R. Civ. P. 41(a) ((2), a decision to dismiss claims without prejudice is within the discretion of the Court. As plaintiffs indicated, the relief granted on the counts decided in this case has made the resolution of the remaining counts unnecessary. Defendants have not alleged that they will suffer legal prejudice other than the mere prospect of a second lawsuit. The mere prospect of a second lawsuit simply is not

a sufficient basis to deny plaintiffs' request. 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 2364 (2d Ed. 1995).

Accordingly, Counts II, III, IV, V and VI are **DISMISSED without prejudice.**

**IT IS FURTHER ORDERED** that pursuant to 28 U.S.C. § 636(b) (1) (b), plaintiffs' request for attorneys' fees is referred to Magistrate Judge Virginia Morgan for report and recommendation. Accordingly, plaintiffs' request for entry of final judgment is **DENIED**, until such time as the Court has received and reviewed the report and recommendation on the matter of attorneys' fees and resolved any objections to that report and recommendation.

So Ordered.

/s/_____
GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

Copies mailed to: Kenneth J. McIntyre/Robert W. Powell
Kenneth B. Morgan/
Hon. Virginia M. Morgan

A TRUE COPY

/s/_____
Deputy Clerk